Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MAINE SHIPYARD & MARINE RAILWAY, INC.,

Petitioner,

v.

PNC BANK DELAWARE, INC., A BANKING INSTITUTION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE WITH A PLACE OF BUSINESS IN WILMINGTON, COUNTY OF NEW CASTLE, STATE OF NEW JERSEY

Respondent.

v.

F/V MISS LAURA (O.N. 542762), HER ENGINES, MACHINERY, EQUIPMENT, MASTS, FISHING PERMITS, ETC., IN REM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: November 18, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether a maritime lien, which attaches to a vessel and its appurtenances, is extinguished when the vessel sinks, even though a significant intangible appurtenance, its fishing history and the right to apply for a limited access permit, is transferred to a replacement vessel.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it is a closely held company. It has no parent companies nor does any publicly held company hold any interest in it.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third Circuit is reported at 381 F.3d 183. Appendix (App.), *infra*, 1a-8a. The opinion of the United States District Court for the District of New Jersey granting Respondent's motion for summary judgment and dismissing Petitioner from the action is reported at 243 F.Supp.2d 175. App., *infra*, 9a-15a.

JURISDICTION

Judgment was entered on August 25, 2004 by the United State Court of Appeals, Third Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

The establishment of maritime liens under 46 U.S.C. § 31342 (2000) and fisheries conservation and management under 16 U.S.C. § 1800 *et. seq.* (2000).

STATEMENT

Respondent, PNC Bank, commenced this action to foreclose on a ship's mortgage held against the *F/V Miss Laura*. The Petitioner intervened pursuant to Rule C of the Supplemental Rules of Certain Admiralty and Maritime Claims. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1333 in that the claim being made by the parties was an admiralty or maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. Jurisdiction for the appeal was pursuant to 28 U.S.C. § 1291 and alternatively 28 U.S.C. § 1292(a)(3). The District Court granted Respondent's motion for summary judgment, dismissed the Petitioner from the action, and

denied the Petitioner's motion for summary judgment as moot. The Appeals Court affirmed, but on different grounds.

David Greenly was the owner and manager of the *F/V Miss Penelope* from July of 1997 through January 28, 1998 when she sank. App., *infra*, 3a. Petitioner provided repair services to said vessel during the period of July 14, 1997 through July 21, 1997. Petitioner's repair services provided to the *Miss Penelope* entitled it to a maritime lien against the vessel and its appurtenances under federal law. *Id.* at 11a; See 46 U.S.C. § 31342.

Prior to sinking, the *Miss Penelope* held a limited access Northeast Multispecies permit and fishing permit history as part of the Magnuson-Stevens Fishery Conservation and Management Act. See 16 U.S.C §1800 et. seq; See also 50 C.F.R. § 648.4(a)(1)(i). The fishing history qualified the *Miss Penelope* to hold limited access fishing permits to catch certain species that it would otherwise not be permitted to catch. App., *infra*, 11a. The permits and history contributed greatly to the value of the *Miss Penelope* because certain species can no longer be fished without a limited access permit. *Id.* at 11a.

After the *F/V Miss Penelope* sank, David Greenly preserved *Miss Penelope's* limited access fishing rights and fishing permit history in the Northeast Multispecies fishery, American Lobster fishery, and Atlantic Sea Scallop fishery by submitting an application and receiving a confirmation of permit history from the National Marine Fisheries Service. 50 C.F.R. § 648.4(a)(1)(i)(J). By preserving the permits and permit history, David Greenly became eligible to obtain limited access fishing rights for a replacement vessel. *Id.* On March 26, 1998, the National Marine Fisheries Service issued a confirmation of the destroyed vessel's permit history expressly for a replacement vessel. App., *infra*, 3a.

On September 11, 1998, David Greenly acquired the *Miss Laura* as a replacement vessel for the *Miss Penelope*. App., *infra*, 3a. However, *Miss Penelope's* fishing permits and history were not transferred to the *Miss Laura* immediately

upon David Greenly acquiring the replacement vessel. Rather, they remained as confirmation of permit history with the National Marine Fisheries Service. 50 C.F.R. §648.4(a)(1)(i)(J).

Respondent, PNC Bank, financed the purchase of the *Miss Laura*. App., *infra*, 11a. On August 13, 1998, David Greenly executed and delivered to PNC Bank a preferred ship mortgage against the *F/V Miss Laura*.

On July 27, 1999, the National Marine Fisheries Service approved the replacement of the *F/V Miss Penelope* with the *F/V Miss Laura*. App., *infra*, 3a. On July 29, 1999, the National Marine Fisheries Service issued limited access fishing permits to the *F/V Miss Laura* based upon the fishing history from the *Miss Penelope*. *Id.* at 3a.

On July 29, 2000, David Greenly conveyed and delivered a bill of sale for the *F/V Miss Laura* to PNC Bank. On July 29, 2000, David Greenly also entered into a Loan Forbearance Agreement. On November 14, 2002, PNC Bank informed David Greenly that it reserved its rights to record the bill of sale and take immediate possession of the *Miss Laura*.

After David Greenly defaulted on a Promissory Note to PNC Bank, Respondent commenced the present action seeking judicial sale of the *Miss Laura*. App., *infra*, 12a. The *F/V Miss Penelope's* fishing history was attached to the *F/V Miss Laura*, and permits issued based on said history were located aboard the *F/V Miss Laura*. Petitioner entered the action as an intervening plaintiff against the *Miss Laura* to enforce its maritime lien over *Miss Penelope's* permits. The District Court granted Respondent's motion for summary judgment and dismissed the Petitioner from the action by holding the maritime lien held by Petitioner did not survive the sinking of the *Miss Penelope*. *Id.* at 7a. The District Court based its decision on the misapplication of salvage law. The District Court held salvage law inapplicable because for it to apply some tangible piece of the subject vessel needed to be rescued. The District Court

found no physical piece of property rescued and therefore extinguished Petitioner's maritime lien. *Id.* at 6a-7a.

The Third Circuit affirmed, but on different grounds because it concluded the District Court's "...rationale comes needlessly close to conflicting..." with an earlier decision of the First Circuit in *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001). App., *infra*, 13a. Instead, the Third Circuit held Petitioner unable to enforce its maritime lien against the *Miss Laura* because Petitioner did not provide any services to her. The Third Circuit derived its rationale from the principle that a maritime lien is only enforceable against the specific vessel, to which services are provided. It concluded that the *Miss Laura* could not be held responsible for the debts of the *Miss Penelope* because each vessel "is considered to be a distinct identity and responsible only for its own debts". *Id.* at 13a.

The Third Circuit did not answer whether Petitioner's maritime lien against the *Miss Penelope* included a lien over her fishing permits and history and followed the permits to a replacement vessel. Rather, the Third Circuit assumed fishing permits may be subject to maritime liens without specifically speaking to the question. Also, the Third Circuit did not answer whether the maritime lien, if enforceable, was extinguished upon transfer to the *Miss Laura*. The conclusion the Third Circuit did reach was that Petitioner could not assert its maritime lien against the *Miss Laura* as the Petitioner had not performed any work to the *Miss Laura*.

REASONS FOR GRANTING THE PETITION

Uniformity in all aspects of maritime law is essential to maritime commerce, especially with regard to fishermen. The decision in this case is significantly frustrates the uniform application of maritime law. The importance of the issue before this Court allows no room for a conflict between the circuits. Moreover, the decision below is erroneous and

this Court has the opportunity to correct the decision and restore uniformity.

I. The Third Circuit's Interpretation of Maritime Liens is in Conflict with the First Circuit's Interpretation

The decision below creates a conflict in the circuits over when a maritime lien attached to a vessel and its fishing history and permits is extinguished. The Third Circuit's holding results in a maritime lien attached to a vessel's fishing permits and history being extinguished when the history and permits are severed from the original vessel and incorporated into a replacement vessel. In contrast, the First Circuit previously recognized that many courts have already held that a maritime lien attached to the same intangible appurtenance could not be extinguished by severing the history and permits from the original vessel. See *Gowen, Inc. v. F/V Quality One,* 244 F.3d 64, 69 (1st Cir. 2001) citing *Stewart & Stevenson Servs, Inc. v. M/V Chris Way MacMillian, 890 F.Supp. 552 (N.D. Miss 1995); F/V Sylvester F. Whalen,* 217 F.Supp. 916, 917 (D.Me. 1963); 2 BENEDICT ON ADMIRALTY §32 at 3-3 to 3-5 (7th Ed. 2000); 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-1 at 488-489 (2nd ed. 1994). The conflict arises based on the intangible nature of a vessel's fishing history and permits and a short review of the settled law is helpful.

A maritime lien against a vessel arises from services rendered or injuries caused by the vessel. See generally 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 7-1 (4th ed. 2004). A maritime lien attaches not only to the vessel but also her appurtenances. *The Joseph Warner*, 32 F.Supp. 532, 533 (D.Mass. 1939); See generally, 2 *Benedict on Admiralty* § 32 (7th ed. 2000). Appurtenances include items that are "...essential to the vessel's navigation, operation, or mission." *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 67 (1st Cir.2001) quoting *Gonzalez v. M/V Destiny Panama*, 102

F.Supp.2d 1352, 1356 (S.D.Fla.2000). It is also settled that intangible property may be classified as an appurtenance. See *United States v. Freights, Ect. Of the Mount Shasta*, 274 U.S. 466, 470 (1927). In *Gowen*, the First Circuit classified fishing permits as an intangible appurtenance making them subject to maritime liens under 46 U.S.C. §31301, et. seq. *Gowen*, 244 F.3d 64, 68; See also *Bank of America, NT & SA v. Pengwin*, 175 F.3d 1109 (9th Cir. 1999) cert denied, 528 U.S. 872, 120 S.Ct. 174, 145 L.Ed.2d 147 (1999) (permits assumed to be subject to liens).

The District Court in the present case held a maritime lien attached to fishing permits extinguished once the vessel was destroyed because maritime salvage could not apply unless some physical part of the vessel was brought up. App., *infra*, 6a. The court conceded that if some physical portion of the vessel was salvaged the maritime lien would attach to it. *Id.* at 6a. Refusing to extend this principle to intangible property the court held that Maine Shipyard's maritime lien was extinguished when the *Miss Penelope* sank. *Id.* at 7a.

The interpretation of the District Court is in conflict with the First Circuit's conclusion that fishing permits retain significant value apart from the vessel. *Gowen*, 244 F.3d 64, 68. The Third Circuit realized such and states, "We believe this rationale comes needlessly close to conflicting with the theory of *Gowen*, and are mindful of our obligation to avoid circuit conflict." App., *infra*, 13a. Unfortunately, instead of avoiding circuit conflict the Third Circuit affirms the lower court claiming, "Rather than invite this possible conflict, we base our holding on the undisputed fact that Maine Shipyard did not provide services to the vessel over which it now claims a lien." *Id.* at 14a. Not only is this reasoning flawed, as will be discussed later, but it also results in a conflict with the First Circuit.

The circuits are in conflict because the result of the Third Circuit's holding allows for extinguishment by severability but the First Circuit's holding does not. In *Gowen*, the First Circuit recognized that a maritime lien as to the fishing

permits could not be extinguished by selling the vessel subject to the lien and placing the permits free and clear on a replacement vessel. However, the Third Circuit's holding does allow a maritime lien to be extinguished by sinking the vessel subject to the lien and using the permits free and clear on a replacement vessel. The Third Circuit's attempt to distinguish the sinking of the subject vessel with a foreclosure sale of the subject vessel is not persuasive because the basis for the extension of credit is still in existence and valuable in both circumstances. App., *infra*, 26. Third Circuit's application allows severability and extinguishment as if the permits were merely personal property, but the First Circuit is clear that they are appurtenances to the vessel and continue to be subject to the maritime lien until such time as the lien is somehow extinguished. *Gowen*, 244 F.3d 64, 67.

Therefore, the decision below contradicts the First Circuit's holding with respect to the extinguishment of maritime liens. The Court should grant certiorari to review and resolve this important conflict.

II. The Question Presented is Important

The importance of maritime liens to fishermen allows no room for uncertainty. The theory of law recognizing maritime liens is that providers of goods and services to a vessel benefit the vessel, and all those who have claims against the vessel in that subsequent services enable the vessel to continue its voyages to generate the income to pay the vessel's debts. See *The St. Jago de Cuba*, 22 U.S. 409, 9 Wheat. 409, 6 L.Ed. 122 (1824). Necessary goods and services are provided based on the vessel's credit which, for a fishing vessel, is sometimes entirely created by its permits. See *Gowen* 244 F.3d 64, 68 ("...the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation equipment.") It is important for this Court to clarify the

issue because continued uncertainty could decrease the willingness of creditors to provide necessities to vessels. This result is contrary to the reasons that gave rise to maritime liens.

Unfortunately, the Third Circuit created greater uncertainty by its decision in this case. In *Gowen*, the First Circuit discussed the lack of precedent noting, "There is no evidence of any common understanding in the maritime world that permits are, or are not, subject to liens". *Gowen*, 244 F.3d 64, 69; But see *Lush v. Terri & Ruth F/V*, 324 F.Supp. 2d 90 (D.Me. 2004) and *Sailor Inc. F/V v. City of Rockand*, 324 F.Supp.2d. 197 (D.Me. 2004) (District Court decisions citing *Gowen* for the proposition that liens attach to fishing permits). Even the determination of which appurtenance is, or is not, subject to a maritime lien is uncertain and is decided by courts on a case by case basis. See 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-1 (2nd ed. 2004)(citing a wide array of court determinations regarding appurtenances). The Third Circuit created greater uncertainty by framing the issue before it. The Third Circuit assumed a vessel's fishing history may be the subject of a maritime lien without further discussion evading an opportunity to clarify the issue. App., *infra*, 10a; See also *Bank of Am. v. Pengwin*, 175 F.3d 1109, 1119 (9th circuit assumes permits subject to liens without litigating). By the Third Circuit not directly speaking to the issue fishermen and creditors are left not knowing if fishing permits and history are included in maritime liens.

Also, the Third Circuit's decision contradicts the usual expectations of parties at the creation of a maritime lien. A person's reasonable expectation in extending credit to a vessel is that the entire vessel, including all appurtenances, stands as security for the debt. *Stewart & Stevenson Services, Inc. v. The M/V Chris Way MacMillian*, 890 F.Supp. 552, 562 (N.D.Miss. 1995). When a creditor's reasonable expectations are forced to change depending on where the lien may be enforced, the purpose of maritime

liens is not furthered. A change in the reasonable expectations of the parties creates further uncertainty by possibly decreasing the willingness of creditors to provide necessities to a vessel.

Another uncertainty concerning fishing permits is the possible creation of a central registry system for limited access permits. See 16 U.S.C. § 1855(h) (2000). Although Congress empowered the Secretary of Commerce to create a registry system, the implementing regulations are not in force. The creation of a central registry system would achieve uniformity in the enforcement and creation of maritime liens attached to fishing permits, but until it is implemented the current applicable law is to apply. *Gowen*, 244 F.3d 64, 70.

In sum, it is crucial to all involved in the fishing industry to resolve the uncertainty. This Court has the opportunity to bring certainty and uniformity in the area before it gets worse. Therefore, the Court should grant the petition.

III. The Decision of the Court of Appeals is Erroneous

A maritime lien may be extinguished in several different ways including payment of the claim, waiver, laches, foreclosure and sale, and destruction of the *res*. *Walsh v. Tadlock*, 104 F.2d 131 (9th Cir. 1939) (Maritime lien extinguished by destruction of the *res*); See generally 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-7 (2nd ed. 2004). The Third Circuit does not base its decision to extinguish Maine Shipyard's maritime lien on any of these recognized ways. Instead, the Third Circuit based its decision on the long-standing principle that "...maritime liens have consistently been limited to the specific vessel to which services were provided." App., *infra*, 14a. However, this long-standing principle does not extinguish Maine Shipyard's maritime lien because maritime liens extend to both salvaged appurtenances and appurtenances that are removed from an original vessel. Maine Shipyard's existing

maritime lien is enforceable because Rule C of the Supplemental Rules of Certain Maritime and Admiralty Claims allows it.

A. Maritime Liens Extend to Salvaged Appurtenances

The District Court was correct in concluding one way to extinguish a maritime lien is by destruction of the *res*. App., *infra*, 5a; See *Walsh*, 104 F.2d 131. However, destruction of the *res* requires complete destruction because, "to the extent that part of the vessel is salvaged, a lien may be imposed on such remains." See 2 BENEDICTS ON ADMIRALTY §66 citing *Chapman v. Engines of the Greenpoint*, 38 F. 671, (S.D.N.Y. 1889). "If only part of a vessel is destroyed... the lien will attach to the remaining part." 1 SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 7-7 (4th ed. 2004) citing *Dann v. Dredge Sandpiper*, 222 F.Supp. 838 (D.Del. 1963). The Third Circuit refuses to extinguish Maine Shipyard's maritime lien based on the sinking of the *Miss Penelope* and recognizes the possibility that the First Circuit would enforce a lien on a sunken vessel's fishing permits before the permits became incorporated into another vessel. App., *infra*, 14a. If the lien was not extinguished after the sinking of the *Miss Penelope* it must still be attached to her fishing permits and history.

B. Maritime Liens Extend to Appurtenances Removed from a Vessel

Maine Shipyard's maritime lien continued to exist after the separation of the *Miss Penelope* from her fishing permits and history because maritime liens are not extinguished by removing an appurtenance from the vessel. *The Joseph Warner*, 32 F.Supp 532, 534 (D.Mass. 1939). *The Joseph Warner* states the proposition "... whatever is placed in a vessel subject to a lien to carry out the purposes for which

the vessel was equipped .... becomes a part of the vessel, as between lienor and owner, and cannot be removed or otherwise disposed of while the lien is in force." *Id.* at 534. In *Gowen*, the court recognized that severing a vessel from her permits would not extinguish a maritime lien. *Gowen*, 244 F.3d 64, 67. If the lien was not extinguished by separating the *Miss Penelope* from her fishing permits and history then Petitioner's lien must still be attached.

C. Any Maritime Lien is Enforceable by an *in rem* Action

The Third Circuit is in error because it relies on a long-standing principle of maritime lien creation to answer the present question concerning maritime lien enforcement. The Third Circuit correctly holds Petitioner unable to create a maritime lien against the *Miss Laura* by providing repair services to the *Miss Penelope*. App., *infra*, 14a. See 46 U.S.C. § 31342 (2000). The Third Circuit concludes that because a maritime lien can not be created in this manner the lien held by Petitioner "...ceased to exist once the *Miss Penelope* sank and the fishing history was incorporated into the *Miss Laura*." App., *infra*, 15a. However, Petitioner does not contend that it holds a maritime lien against the *Miss Laura* based on repair services provided to the *Miss Penelope*. Rather, Petitioner intervened in the present action to enforce an existing maritime lien it held against an intangible appurtenance transferred from the *Miss Penelope* to the *Miss Laura*.

The Third Circuit holds Petitioner's maritime lien unenforceable without analyzing the statutory enforcement mechanism located in 46 U.S.C. § 31342(a)(2). This enforcement mechanism is an *in rem* action under Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. The Petitioner's maritime lien is enforceable against the *Miss Laura* under Rule C because any maritime lien may

be enforced by an *in rem* action. In pertinent part the Rule states;

> (1) **When Available.** An action in rem may be brought:
>
> (a) To enforce any maritime lien;

Maine Shipyard provided repair services to the *Miss Penelope* establishing a maritime lien against the *Miss Penelope* under 46 § 31342 (a)(1). The lien extended to the *Miss Penelope's* appurtenances including her fishing permits and history because they were essential to the vessel's operation. *Gowen*, 244 F.3d at 67-68. The maritime lien was not extinguished by the destruction of the *Miss Penelope*, rather the lien continued to attach to the permit and history. *Collins v. The Fort Wayne*, 6 F. Cas. 119, 122 (S.D.Ohio 1861). Petitioner intervened seeking to enforce an existing maritime lien it held against *Miss Laura's* fishing permits and history by an *in rem* action within Rule C. The Third Circuit was in error by not enforcing Petitioner's maritime lien in accordance with the clear language of Rule C.

D. An Appurtenance May Solely Constitute the *res* of an *in rem* Action

The Third Circuit is in error because it does recognize the fishing permits and history as the *res* of Petitioner's *in rem* action. A maritime lien holder can proceed *in rem* against an appurtenance, rather than the vessel the appurtenance is located on. *United States v. Freights, etc. of S.S. Mt. Shasta*, 274 U.S. 466, 470 (Intangible property may be considered a *res* for a proceeding *in rem*). Justice Holmes explained, "By the general logic of the law a debt may be treated as a *res* as easily as a ship." *Id.* Under this principal, Petitioner could enforce its maritime lien by an *in rem* action against the

fishing permits and history by treating them as the *res*. Petitioner's intervening complaint against the *Miss Laura, in rem*, includes her appurtenances, specifically her fishing permits and history transferred from the *Miss Penelope*. Petitioner's lien against the fishing permits and history is enforceable because the *res* of the action includes the permits and history.

It is true that to avoid confusion Petitioner could have proceeded *in rem* only against the permits and history. However, "Admiralty procedure is generally to be liberally construed to enable creditors to assert their claims against a libeled vessel." *Bank of New Orleans & Trust Co. v. Marine Credit Corp.*, 583 F.2d 1063, 1068 (8th Circuit 1978). It is important to understand that Petitioner needed to intervene in Respondent's *in rem* action against the *Miss Laura* to ensure Petitioner's maritime lien would be recognized. If Respondent conducted the foreclosure sale *in rem* before Petitioner enforced its lien, Petitioner would have been divested of its prior lien. See 2 BENEDICT ON ADMIRALTY §22, citing *Knapp, Stout, & Co., v. McCaffrey*, 177 U.S. 638 (1900).

In conclusion the Third Circuit misapplied maritime law and the Supplemental Rules of Certain Admiralty and Maritime Claims. This Court should grant Maine Shipyard's petition to resolve the conflict in the circuits, clarify the issue, and correct the Third Circuits' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Third Circuit 9a

APPENDIX A

PNC BANK, DELAWARE, Plaintiff, v. F/V MISS LAURA (O.N. 542762) in rem, Defendant. MAINE SHIPYARD & MARINE RAILWAY, INC., Intervening Plaintiff.

CIVIL ACTION NO. 01-4427(JEI)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

243 F. Supp. 2d 175; 2003 U.S. Dist. LEXIS 2007; 2003 AMC 1022

February 13, 2003, Decided

SUBSEQUENT HISTORY: *Affirmed by PNC Bank Del. v. F/V Miss Laura, 2004 U.S. App. LEXIS 18039* (3d Cir. N.J., Aug. 25, 2004)

COUNSEL: Joseph A Martin, Esq., ARCHER & REINER, A PROFESSIONAL CORPORATION, Haddonfield, N.J., for Plaintiff.

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Richard B. Wickersham, Jr., Dennis P. Ziemba, LAVIN, COLEMAN, O'NEIL, RICCI, FINARELLI & GRAY, Mount Laurel, NJ, for Defendant.

OPINION: JOSEPH E. IRENAS, U.S.D.J.

Presently before the court is Plaintiff PNC Bank's motion for summary judgment against Intervening Plaintiff Maine Shipyard & Marine Railway, Inc. Also before the court is Intervening Plaintiff Maine Shipyard & Railway, Inc.'s cross motion for summary judgment against Plaintiff PNC Bank, Delaware. This Court has jurisdiction over this matter pursuant to *28 U.S.C. § 1333*. For the reasons set forth below, Plaintiff's motion for summary judgment is granted and Intervening Plaintiff's motion for summary judgment is rendered moot.

I.

A.

The present dispute arises out of a mortgage foreclosure action between Plaintiff PNC Bank, Delaware ("PNC Bank") and Defendant F/V Miss Laura. That dispute involved a Loan Forebearance Agreement entered into by PNC Bank and David R. Greenly, the owner of the F/V Miss Laura. Alleging a default on the terms of that agreement, PNC Bank commenced the present action seeking the judicial sale of the F/V Miss Laura. Maine Shipyard & Maine Railway, Inc. ("Maine Shipyard") entered the action as an Intervening Plaintiff. Maine Shipyard claims it holds a maritime lien on the F/V Miss Laura, to the extent of her fishing permits and history, which has priority over PNC Bank's preferred mortgage lien. PNC Bank filed a motion for summary judgment arguing that Maine Shipyard's failure to provide any necessaries to the F/V Miss Laura precludes it from asserting a maritime lien on that vessel. Therefore, PNC Bank asks this Court to dismiss Maine Shipyard from this action.

B.

In July 1997, Maine Shipyard provided parts and labor for repair of the engine of the F/V Miss Penelope. Maine Shipyard alleges that it has not been compensated for the repairs it made to the F/V Miss Penelope. The F/V Miss Penelope was a commercial fishing vessel owned at all times relevant hereto by Greenly. On January 28, 1998, the F/V Miss Penelope sank and could not be salvaged.

In order to obtain limited access fishing rights for a vessel that is intended to replace a sunken or destroyed vessel, the regulations initially require that the applicant's eligibility to apply for those rights be preserved. 50 C.F.R. Ch. VI § 648.4(a)(1)(i)(J). An applicant must submit an application for and receive a confirmation of the destroyed vessel's permit history ("CPH"). *Id.* Once the National Marine Fisheries Service has issued the CPH, the applicant is then eligible to apply for a limited access permit for a replacement vessel based on the qualifying vessel's permit history. *Id.*

After the F/V Miss Penelope sank, Greenly submitted an application for a CPH for the F/V Miss Penelope to the National Marine Fisheries Service. On March 26, 1998, the National Marine Fisheries Service issued to Greenly a CPH for the express purpose of replacing the F/V Miss Penelope.

On September 11, 1998, Greenly acquired the F/V Miss Laura, a commercial fishing vessel intended to replace the F/V Miss Penelope. Greenly then submitted an application to the National Marine Fisheries Service for limited access fishing permits for the F/V Miss Laura along with the above referenced CPH. On July 27, 1999, the National Marine Fisheries Service approved the vessel replacement of the F/V Miss Penelope with the F/V Miss Laura. On July 29, 1999, the National Marine Fisheries Service issued limited access fishing permits to the F/V Miss Laura.

II.

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)* (quoting *Fed. R. Civ. P. 56(c)*).

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. American Tel. & Tel. Long Lines, 794 F.2d 860, 864 (3d Cir. 1986).* The role of the court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

III.

A.

PNC Bank seeks the dismissal of Maine Shipyard from the action on the grounds that Maine Shipyard has no rights to the F/V Miss Laura under maritime lien law. Maine Shipyard worked on the F/V Miss Penelope, but not the F/V Miss Laura. Since maritime liens cannot survive a vessel's destruction or submergence, *Walsh v. Tadlock, 104 F.2d 131, 132 (9th Cir. 1939),* PNC Bank argues that any maritime lien Maine Shipyard could claim against the F/V Miss Penelope was extinguished when that vessel sank and could not be recovered.

In their opposition to summary judgment, Maine Shipyard claims that the maritime lien it possessed on the F/V Miss Penelope transferred to the F/V Miss Laura when Greenly obtained new limited access permits for the F/V Miss Laura based on the confirmation of the F/V Miss Penelope's

fishing history. Maine Shipyard argues that maritime liens attach to the vessel and the vessel's appurtenances, including the vessel's commercial fishing permits. Relying on the rule that maritime liens may be imposed on salvaged portions of vessels, Maine Shipyard argues that it maintained the right to assert a maritime lien against the commercial fishing permits and permit history of the F/V Miss Penelope as salvaged appurtenances of that vessel. When Greenly obtained new fishing permits for the F/V Miss Laura based on the F/V Miss Penelope's fishing permits and permit history, Maine Shipyard argues that the maritime lien followed.

The parties agree that there is no genuine issue of material fact, and so therefore summary judgment is proper. The central issue to be decided is whether Maine Shipyard's maritime lien, valid as against the F/V Miss Penelope, continues to be valid against the F/V Miss Laura. Since the process undertaken to preserve the F/V Miss Penelope's fishing permit history does not fall within the standard definition and understanding of the term "salvage", this Court holds that Maine Shipyard's maritime lien against the F/V Miss Penelope was extinguished when the F/V Miss Penelope sank and could not be saved.

B.

"A maritime lien is a privileged claim upon maritime property ... arising out of services rendered to or injuries caused by that property." Schoenbaum, *Admiralty and Maritime Law, Third Edition,* § 9-1, p.494 (2001). Once a maritime lien attaches to the property, it remains adhered to that property "until it is either executed through the *in rem* legal process ... or is somehow extinguished by operation of law." *Id.* The general rule provides that the total destruction of a vessel will extinguish all maritime liens existing on that vessel. *Walsh, 104 F.2d at 132.* However, "if only part of the vessel is destroyed ... the lien will attach to the remaining

part." Schoenbaum, *Admiralty and Maritime Law, Third Edition,* § 9-7 (2001).

Even if we accept that the F/V Miss Laura's fishing permits are properties related to the F/V Miss Penelope, the rule on which Maine Shipyard relies is inapplicable here. That rule assumes that some physical part of the vessel has been salvaged in some way.[1] "It is equally well settled, that if any part of the vessel is saved, [the] lien adheres to it, even to the last plank." *Collins v. The Fort Wayne,* 1 Bond 476, *6 F.Cas. 119, 122,* F. Cas. No. 3012, F. Cas. No. 3012 (S.D.Ohio 1861) (emphasis added). When some physical portion of a vessel is salvaged, a maritime lien may attach to it, but if the entire vessel has been destroyed, all maritime liens against that vessel are extinguished.

The traditional definition of salvage requires some kind of "saving or rescuing." *Webster's Third New International Dictionary* 2006 (1993). Furthermore, the law defines salvage as the "service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended." *Cargill v. M/ T Pacific Dawn, 876 F. Supp. 508, 511 (S.D.N.Y. 1995).* The process as defined in the regulations for obtaining a confirmation of a vessel's permit history does not fall within the standard definition and understanding of salvage.

Under the regulations, a person eligible to obtain a CPH must apply "no later than 30 days prior to the end of the first full fishing year in which a vessel permit cannot be issued."

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[1] All cases of salvage involve some physical piece of the vessel. There is no precedent for the proposition that salvage has ever been defined as extending beyond a physical part of the vessel. *See Cargill v. M/ T Pacific Dawn, 876 F. Supp. 508 (S.D.N.Y. 1995); Eagle Star & British Dominions v. Tadlock, 22 F. Supp. 545 (S.D.Cal. 1938); The Convoy, 257 F. 843 (E.D.N.Y. 1919); Chapman v. The Engines of the Greenpoint, 38 F. 671 (S.D.N.Y. 1889); Collins v. The Fort Wayne,* 1 Bond 476, *6 F.Cas. 119,* F. Cas. No. 3012 (S.D.Oh. 1861).

50 C.F.R. Ch. VI § 648.4(a)(1)(i)(J). The CPH application process is not one that is done in the presence or apprehension of distress or danger.

Furthermore, the confirmation of permit history only "preserves the eligibility of the applicant to apply for a limited access permit for a replacement vessel based on the qualifying vessel's fishing and permit history at a subsequent time." *Id.* The CPH preserved Greenly's eligibility to apply for subsequent limited access fishing permits, it did not save or rescue any portion of the F/V Miss Penelope.

Construing the facts and inferences in a light most favorable to the non-moving party, Maine Shipyard held a valid maritime lien on the F/V Miss Penelope prior to its demise. However, once the F/V Miss Penelope sank and was destroyed in January 1998, Maine Shipyard's maritime lien was extinguished. Greenly's acquisition of subsequent limited access fishing permits for the F/V Miss Laura based on the fishing and permit history of the F/V Miss Penelope does not constitute a salvage of the F/V Miss Penelope or its appurtenances.

C.

Having decided that Maine Shipyard's maritime lien against the F/V Miss Penelope was extinguished when that vessel was destroyed, Maine Shipyard will be dismissed from this action. Maine Shipyard's Cross Motion for Summary Judgment, therefore, is rendered moot and need not be considered.

IV.

For the reasons set forth above, Plaintiff's Motion for Summary Judgment against the Intervening Plaintiff is granted. Accordingly, Maine Shipyard's motion for summary judgment is rendered moot. The Court will enter an appropriate order.

Dated: February 13, 2003

/s/ JOSEPH E. IRENAS, U.S.D.J.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING INTERVENING PLAINTIFF FROM THE ACTION AND DENYING INTERVENING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS MOOT

IRENAS, District Judge:

This matter having appeared before the Court upon Plaintiff's motion for summary judgment and Intervening Plaintiff's motion for summary judgment, the Court having considered the submissions of the parties, for the reasons set forth in an opinion issued by this Court, which findings of fact and conclusions of law are incorporated herein by reference, and for good cause appearing,

IT IS on this 13th day of February, 2003,

ORDERED THAT:

1. Plaintiff PNC Bank, Delaware's motion for summary judgment is GRANTED and Intervening Plaintiff Maine Shipyard and Marine Railway, Inc. is hereby DISMISSED from this action.

2. Intervening Plaintiff Maine Shipyard and Marine Railway, Inc.'s motion for summary judgment is DENIED as moot.

/s/ JOSEPH E. IRENAS, U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1695

PNC BANK DELAWARE, a banking institution organized under the laws of the State of Delaware with a place of business in Wilmington, County of New Castle, State of New Jersey

v.

F/V MISS LAURA, (O.N. 542762), her engines, machinery, equipment, masts, fishing permits, etc., in rem
R.D. GRIER & SONS, INC.; MAINE SHIPYARD & MARINE RAILWAY, INC.; SMITHWICK & MARINERS INSURANCE COMPANY; DON'S HYDRAULICS, INC.,

Intervenor-Plaintiffs in District Court
Maine Shipyard & Marine Railway, Inc.,
Appellant

On Appeal from the United States
District Court for the District of New Jersey
No. 01-cv-04427
District Judge: Honorable Joseph E. Irenas

Argued: March 22, 2004
Before: FUENTES, SMITH and GIBSON,* Circuit Judges.
(Filed: August 25, 2004)

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OPINION OF THE COURT

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*The Honorable John R. Gibson,
United States Court of Appeals for the
Eighth Circuit, sitting by designation.

JOHN R. GIBSON, Circuit Judge:

This case presents the novel question of whether, assuming a vessel's fishing history may be the subject of a maritime lien, the lien follows the transfer of the fishing history to a replacement vessel after the original vessel sinks. The district court held that fishing history could not be "salvaged" from a sunken vessel and therefore any maritime lien that may have existed was extinguished at the time of the sinking. We affirm, but on different grounds.

I.

Maine Shipyard & Marine Railway, Inc., provided repair services in 1997 to the vessel *F/V Miss Penelope*, which was owned by David Greenly. This provision of services entitled Maine Shipyard under federal law to a maritime lien against the vessel and its appurtenances. See 46 U.S.C. § 31342 (2000); Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 67 (1st Cir. 2001). The *Miss Penelope* sank on January 28, 1998.

As a result of a complex scheme of federal rules and regulations designed to protect declining fishing stocks and otherwise conserve fishery resources, the fishing history and fishing permits of a vessel like the *Miss Penelope* are integral to the value of the vessel itself. See generally 16 U.S.C. § 1801 (2000); Gowen, 244 F.3d at 68 (some fishing vessels "are valuable significantly, and sometimes almost entirely, because of their permits"). The amount and species of fish that a particular vessel is licensed to catch often depends on that vessel's fishing history, and certain species cannot be fished at all except by or in place of vessels that have previously held permits to do so. See, e.g., 50 C.F.R. § 648.4(a)(1)(i). However, when a vessel sinks, its fishing history does not go down with the ship; instead, the history and permits may be applied to a replacement vessel. See id. Thus, when the *Miss Penelope* sank, Greenly applied her fishing history and permits to the vessel he bought to replace her, the *F/V Miss Laura*.

Greenly's purchase of the *Miss Laura* was financed by the appellee, PNC Bank Delaware, Inc., which made an initial loan of $475,000 and later increased the amount of the loan to $570,000. In exchange, Greenly executed and delivered a Promissory Note to PNC, which was secured by a Preferred Ship Mortgage on the *Miss Laura*. Greenly later defaulted on the note.

PNC commenced the present action seeking the judicial sale of the *Miss Laura*. Maine Shipyard intervened, claiming that it held a maritime lien on the *Miss Laura* to the extent of her fishing permits and history because the permits and history had been transferred from the *Miss Penelope*. Maine Shipyard further contends that its lien has priority over any security interest held by PNC.

II.

Maine Shipyard rests its argument primarily on *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 67-70 (1st Cir. 2001), in which the First Circuit held that a vessel's fishing permits were appurtenances to the vessel and therefore subject to a lien on the vessel. The court reasoned that the market value and creditworthiness of the vessel depended as much on the fishing permits as on tangible items like the engine or navigation equipment; thus, a creditor's lien should be understood to extend over the permits. *Id.* at 68-69.

PNC persuasively responds that Gowen does not govern the instant situation because the fishing permits in that case were still attached to the *original* vessel, whereas the present situation involves the transfer of the fishing permits to a *replacement* vessel. Thus, even if we were to follow Gowen and hold that a vessel's fishing permits may be the subject of a maritime lien, we would still need some legal basis for concluding that the lien extends to a replacement vessel once the permits are transferred.

Maine Shipyard simply ignores this problem, perhaps because neither Gowen nor other statutory or case law provides such a legal basis. Instead, the law of maritime liens has consistently recognized that a maritime lien attaches only to the specific vessel to which services are provided. See, e.g., 46 U.S.C. § 31342 (2004) ("[A] person providing necessaries to a vessel on the order of the owner or a person

authorized by the owner– (1) has a maritime lien on *the* vessel. . . .") (emphasis added); *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 4 (1920) ("[O]ne vessel of a fleet cannot be made liable under the [Federal Maritime Lien Act] for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract."); *In re Container Applications Int'l, Inc.*, 233 F.3d 1361, 1365-66 (11th Cir. 2000) (following Piedmont and denying maritime lien because the purported lienholder did not provide necessaries to any particular vessel). The vessel-specific character of maritime liens results from the legal fiction that a vessel receiving services "is considered to be a distinct entity responsible only for its own debts." *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 701 (9th Cir. 1987). Because Maine Shipyard provided no services to the *Miss Laura*, its attempt to enforce a lien over that vessel violates this principle of maritime liens. The *Miss Laura* cannot be held responsible for the debts of the *Miss Penelope*.

In resolving this case, we need not endorse the district court's position that fishing history cannot be salvaged from a sunken vessel. The court believed that Maine Shipyard's lien over the fishing permits could survive the sinking of the *Miss Penelope*, if at all, only through principles of salvage law. However, the court concluded that salvage law was inapplicable because it understood salvage to involve some sort of physical rescuing or saving of a tangible piece of property, which did not occur here. Thus, it held that Maine Shipyard's lien extinguished at the time of the sinking.

We believe this rationale comes needlessly close to conflicting with the theory of Gowen, and are mindful of our obligation to avoid circuit conflict. Under the district court's reasoning, any lien held by Maine Shipyard over the *Miss Penelope*'s fishing permits ceased to exist once the vessel

sank. It is possible that a court following Gowen would not agree; after all, the fishing permits continued to exist in at least some form, retained significant value, and contributed to the creditworthiness of the vessel in the first place. See *Gowen*, 244 F.3d at 68 ("Thus, not only the market value but the creditworthiness of the fishing vessel may well depend on its permits quite as much as on its engine, physical dimensions, and navigation equipment."); see also *United States v. Freights, Etc. of the Mount Shasta*, 274 U.S. 466, 470 (1927)(intangibles may be subject to maritime liens against the vessel); The Fort Wayne, 6 F. Cas. 119, 122 (S.D. Ohio 1861)("[I]f any part of the vessel is saved, this lien adheres to it, even to the last plank."). Should a creditor attempt to foreclose on a sunken vessel's fishing permits *before* the permits become incorporated into a second vessel, a court following Gowen might enforce the lien, whereas the district court's rationale clearly would deny it.

Rather than invite this possible conflict, we base our holding on the undisputed fact that Maine Shipyard did not provide services to the vessel over which it now claims a lien. Even if, as Maine Shipyard metaphorically suggests, the "valuable and transferable fishing permits and history remain very much afloat," Maine Shipyard has not cited, nor have we found, any cases where a lien over salvaged or never-sunken parts of a vessel was extended to a subsequent vessel to which those parts became attached. Instead, maritime liens have consistently been limited to the specific vessel to which services were provided. See *Piedmont*, 254 U.S. at 4 ("The difficulty which under the general maritime law would have blocked recovery by the [purported lienholder] is solely that it did not furnish coal to the vessels upon which it asserts a maritime lien; and there is nothing in the [Federal Maritime Lien Act] which removes that obstacle."); see also 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 9-1 (4th ed. 2004) ("A maritime lien is a privileged claim upon maritime property, such as a vessel, arising out of services

rendered to or injuries caused by that property."). We are bound to follow this long-standing principle here and therefore conclude that any lien held by Maine Shipyard on the *Miss Penelope*'s fishing permits and history ceased to exist once the *Miss Penelope* sank and the fishing history was incorporated into the *Miss Laura*.

Because we hold that Maine Shipyard has no cognizable property interest in the *Miss Laura*, we need not consider its assertion that PNC is ineligible to assert a lien in an *in rem* action against the *Miss Laura*. Maine Shipyard has no standing to make such a challenge. See, e.g., *Citicorp Sav. of Illinois v. First Chicago Trust Co. of Illinois*, 645 N.E.2d 1038, 1045 (Ill. App. Ct. 1995) ("Standing requires injury in fact to a legally cognizable interest."); *Southern Maryland Oil, Inc. v. Kaminetz*, 272 A.2d 641, 644-45 (Md. 1971) (party lacks standing to challenge a mortgage foreclosure sale unless that party has an interest in the proceeds of the sale or has an interest in the property which may be adversely affected as a result of the sale).

We will affirm the district court's judgment.

(2)

DEC 16 2004

No. 04-708

In the Supreme Court of the United States

MAINE SHIPYARD & MARINE RAILWAY, INC.,
Petitioner,

v.

PNC BANK DELAWARE, a banking institution organized under the laws of the state of Delaware with a place of business in Wilmington, County of New Castle, State of New Jersey,
Respondent

v.

F/V MISS LAURA (O.N. 542762), her engines, machinery, equipment, masts, fishing permits, etc., *in rem*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should consider petitioner's novel argument – never adopted by any court – that a supplier has a maritime lien on a fishing vessel for which he furnished no supplies or services whatsoever, merely because he had a lien on a different boat whose fishing history was used to obtain fishing permits for the vessel in question.

RULE 26.9 STATEMENT

Pursuant to Supreme Court Rule 26.9, Respondent, PNC Bank Delaware, states that it is a wholly owned subsidiary of PNC Financial Services Group, Inc., a publicly traded company. PNC Financial Services Group, Inc. holds a majority interest in Blackrock, Inc., a publicly traded company.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In July 1997, petitioner, Maine Shipyard & Marine Railway, Inc. (Maine Shipyard), furnished repair services to the *F/V Miss Penelope*, a commercial fishing vessel owned by David Greenly. On January 28, 1998, the vessel sank and could not be salvaged. The vessel's permits, which were kept on board, went down with the boat.

Greenly submitted an application for confirmation of the vessel's permit history (CPH) to the National Marine Fisheries Service (NMFS) pursuant to federal regulations. *See* 50 C.F.R. §648.4(a)(1)(i).[1] The NMFS issued the CPH on March 26, 1998. Next, on September 11, 1998, Greenly purchased the *F/V Miss Laura*, with financing from respondent, PNC Bank Delaware (PNC). At the same time, Greenly executed and delivered to PNC a preferred ship mortgage on the *F/V Miss Laura*, which granted a continuing security interest in all present and future rights in connection with the ownership and operation of the vessel. He then submitted to the NMFS an application for limited access fishing permits for his new vessel, along with his CPH. The NMFS approved the replacement of the *F/V Miss Penelope* with the *F/V Miss Laura* on July 27, 1999 and issued limited access fishing permits for the latter on July 29, 1999.

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[1] These regulations apply only to domestic fishing in certain fisheries of the Northeastern United States. *See* 50 C.F.R. §648.1.

In 2001, after Greenly defaulted, PNC commenced an action to foreclose on its ship mortgage and to obtain the judicial sale of the *F/V Miss Laura*. Maine Shipyard intervened and for the first time claimed a maritime lien on the *F/V Miss Laura*, based on an alleged outstanding principal balance of $20,349.23 for work performed on the *F/V Miss Penelope*. It is undisputed, however, that at no time, either before or after Greenly's acquisition and mortgage of the vessel, did Maine Shipyard ever provide necessaries or furnish labor or supplies to the *F/V Miss Laura*. Maine Shipyard claimed a lien on the vessel "to the extent of the value of her fishing permits and history" solely by virtue of its theory that these intangibles were transferred from the *F/V Miss Penelope* after she sank. Nevertheless, the permit number for the *F/V Miss Laura's* permit was different from that of the *F/V Miss Penelope*. The most recent set of fishing permits for the *F/V Miss Laura* were issued to that vessel on April 26, 2000, with expiration dates on or before April 30, 2001.

The District Court rejected Maine Shipyard's claim and granted PNC's Motion for Summary Judgment. The Court of Appeals for the Third Circuit unanimously affirmed, albeit on somewhat different grounds.

REASONS FOR DENYING THE PETITION

I. This Case Entails No Conflict Among the Circuits.

Contrary to Maine Shipyard's assertion, the Third Circuit's decision does not conflict with any holding in any other circuit. *No court, anywhere, at any time, has adopted Maine Shipyard's position*. No court has even suggested that a lien claimant has a valid lien on a vessel "to the extent of the value of her fishing permits and history" on the theory

that such permits and history were transferred from another vessel on which the claimant previously had asserted a lien.

Maine Shipyard's reliance on *Gowen, Inc. v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001) is misplaced. The fact pattern and holding of *Gowen* were markedly different from those in the instant case. Unlike this case, *Gowen* did not involve a sunken vessel. Unlike this case, *Gowen* did not involve a claim that a maritime lien could "jump ship" and attach to a replacement vessel. Moreover, unlike this case, *Gowen* dealt only with a dispute between a lienholder and the vessel owner as to whether an undisputed lien encompassed fishing permits, rather than a dispute between a mortgagee of a vessel and a stranger to the vessel who claimed that its lien on the permits of a separate vessel gave rise to a lien on the mortgaged vessel.

In *Gowen*, the First Circuit confronted an issue of first impression – whether, in the context of a foreclosure sale, a maritime lien on a fishing vessel encompassed the vessel's fishing permits and related fishing history. The court observed that the determination of whether something is an appurtenance subject to a maritime lien is generally made on a case-by-case basis "without great consistency of results" and further noted that the issue was "both novel and difficult." *Gowen*, 244 F.3d at 68, 71. The court concluded that the lien encompassed the vessel's permits. It explained that because the permits reflect the extent to which the fishing vessel is allowed to fish, the "F/V Quality One's permits contributed substantially to the vessel's value ... ." *Id.* at 68. Because such creditworthiness is crucial to the viability of most fishing vessels, the inclusion of the vessel's permits in a maritime lien, according to *Gowen*, would benefit fishermen as much as those who do business with them. *See id.*

Assuming *arguendo* that *Gowen* was correctly decided,[2] it does not follow that a maritime lien extends to another vessel to which fishing permits allegedly have been transferred from the liened vessel. It is one thing to conclude that one who furnishes services to a fishing vessel has a maritime lien that includes the boat's fishing rights; it is quite another to argue that the lien hops from vessel to vessel upon a transfer of permits. The Third Circuit agreed with PNC that nothing in *Gowen* promotes the latter notion. *PNC Bank Delaware v. F/V Miss Laura*, 381 F.3d 183, 185 (3rd Cir. 2004) ("Thus, even if we were to follow *Gowen* and hold that a vessel's fishing permits may be the subject of a maritime lien, we would still need some legal basis for concluding that the lien extends to a replacement vessel once the permits are transferred.")

The Third Circuit sedulously avoided the appearance of a potential conflict with the First Circuit, let alone any actual conflict. The district judge had ruled, in essence, that Maine Shipyard's lien on the *F/V Miss Penelope* and her appurtenances, including any lien on her fishing permits, was extinguished when the vessel sank and could not be salvaged; but the Third Circuit was concerned that a court following the *Gowen* decision *possibly* would disagree, at least in the context of an attempt to foreclose on a sunken vessel's fishing permits *before* the permits become incorporated into a second vessel. *Id.* at 186. Consequently, the court chose to predicate its denial of the appeal on the alternative ground that

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[2] To date, *Gowen* has neither been followed nor explicitly rejected outside the First Circuit. For extensive criticism of the decision, see Comment, *Hook, Line and Sinker(and Fishing Permits Too?): The Inclusion of Fishing Permits as Appurtenances to Maritime Liens*, 8 Ocean & Coastal L.J. 205 (2003).

any lien on the *F/V Miss Penelope's* fishing permits did not attach to the *F/V Miss Laura*. *Id.* at 186-187. This disposition is entirely consistent with the holding and rationale of *Gowen*, which did not address the transfer of fishing permits to another vessel.

This Court need not resolve a conflict which exists only in the mind of Maine Shipyard.

II. This Case is Not Sufficiently Important to Warrant Review on Certiorari.

Although, as discussed *infra*, a ruling in favor of Maine Shipyard could unsettle relations between lenders and fishing boat owners, the significance of the decision below is quite limited. It resolves an issue constituting a rivulet of a minor tributary of the branch of admiralty law concerning maritime liens. The holding will apply only in cases containing all of the following facts:

(a) A claimant had a valid lien on a vessel;

(b) The vessel was a commercial fishing boat;

(c) The vessel was completely destroyed or lost before the lien was satisfied;

(d) At the time of the loss or destruction, the vessel had valid fishing permits from the NMFS;

(e) The vessel owner purchased a replacement vessel;

(f) The owner obtained a CPH; and

(g) The NMFS approved the vessel replacement and issued fishing permits to the replacement vessel based on the CPH.

This is not a situation that is likely to recur frequently. Indeed, it is indicative of the rarity of this confluence of events that Maine Shipyard is unable to cite any other case in which a court confronted this issue. In addition, Maine Shipyard's theory depends on regulations that are not even national in scope, but only regional. This Court need not devote precious judicial resources to a question that might never arise in the future. Moreover, even if the issue were to recur, it is unlikely that any other court would reach a different result, as discussed below.

III. This Case was Correctly Decided.

Maine Shipyard's argument is devoid of merit, for several reasons. PNC outlined eight reasons below, but four should suffice here. First, its theory flies in the face of the established rule that maritime liens cannot survive the vessel's destruction or submergence. *See, e.g., B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 628 n.2 (5th Cir. 1988) (*citing 2 Benedict on Admiralty* §66); *Walsh v. Tadlock*, 104 F.,2d 131, 132 (9th Cir. 1939), *cert. denied*, 308 U.S. 584 (1939); *West of England Ship Owners Mutual Protection & Indemnity Ass'n v. Patriarch Steamship Co.*, 491 F. Supp. 539, 542 (D. Mass. 1980); *Central Soya Co., Inc. v. Cox Towing Corp.*, 417 F. Supp. 658, 664 (N.D. Miss. 1976).

Here, when the *F/V Miss Penelope* "sank and disappeared, it carried its creditors' maritime liens with it to the ocean floor." *MariTrend, Inc. v. M/V Sebes*, 1997 U.S. Dist. LEXIS 23594 *15 (E.D. La. 1997). Moreover, where a vessel is taken to pieces and a portion used in the

construction of another boat, a lien on the first craft will not follow and attach to the new vessel. 55 C.J.S. *Maritime Liens* §59 (1998). *A fortiori*, once a vessel irretrievably submerges and its liens are thereby extinguished, they cannot be resuscitated by the transfer of the vessel's permits.

Second, the limited exception to the foregoing destruction rule applies only to the extent that physical components of the sunken or destroyed vessel are salvaged. *See Collins v. The Fort Wayne* 6 F. Cas. 119, 122 (S.D. Ohio 1861) ("if any part of the vessel is saved, this lien adheres to it, even to the last plank"). As the District Court below noted, the process for obtaining a confirmation of a vessel's permit history does not in any sense constitute the "salvage" of a vessel (App. 9-10). *PNC Bank, Delaware v. F/V Miss Laura*, 243 F. Supp.2d 175, 178 (D.N.J. 2003); *see Cargill v. M/T Pacific Dawn*, 876 F. Supp. 508, 511 (S.D.N.Y. 1995) (defining salvage).

Third, Maine Shipyard cites no cases (and PNC is aware of none) holding that a lien on a sunken vessel may extend to an appurtenance that has been transferred, after the submersion, to a second vessel. The general rule in maritime law is that once an item is separated from a vessel, it is no longer regarded as an appurtenance. *See, e.g., Crotwell v. Hockman-Lewis Ltd.*, 734 F.2d 767, 768-69 (11th Cir. 1984); *Kinsella v. Zim Israel Navigation Co., Ltd.*, 513 F.2d 701 (1st Cir. 1975); *Miller v. A/B Svenska Amerika Linien*, 454 F.2d 1094 (3d Cir. 1971).

Finally, Maine Shipyard's position contravenes public policy. To date, those providing services or loans to a fishing vessel simply had to make calculations about the creditworthiness of that particular vessel. If Maine Shipyard's arguments were to prevail, it would throw all

transactions with fishing vessels into a state of uncertainty. In addition to assessing creditworthiness, potential creditors would have to research the fishing permits of that vessel, determine whether the permit history of another vessel or vessels had been utilized, and then (if possible) examine the credit history of those other vessels. It is not known what such a change would mean for all of the existing liens on fishing vessels or what it would portend for the future of the fishing industry. The Court should decline the invitation to steer a risky and uncharted course in the choppy waters of maritime lien law.

As its opinion shows, the Third Circuit thoroughly considered Maine Shipyard's novel argument and properly rejected it. There is no need for further review.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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